IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No. 17 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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PARVINBANU WD/O HAMIDMIYA & 2 - Appellant(s)
Versus
SAIYAD GULAM MAIYUDDIN TAHERMIYA & 7 - Defendant(s)

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Appearance :
MR AMAR D MITHANI for Appellant(s) : 1,1.2.1 - 3.
MR AJ SHASTRI for Defendant(s) : 1,
None for Defendant(s) : 2 - 8.

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

Date : 10/02/2006

ORAL JUDGMENT

1. This Appeal from Order arises out of an order passed by learned Principal Sr. Civil Judge, Veraval below Exh.5 application on 14th

September, 2005 in Special Civil Suit No.120 of 1999, whereby the learned Judge rejected the appellant's application for injunction.

2. The prayer made in the injunction application can be briefly translated as under :-

“Therefore it is our prayer that :-

(A) Defendant no.1 or any other defendants be restrained temporarily from disturbing the possession of the plaintiff of the suit land during the pendency of the suit. Alternatively if it is believed that the defendant no.1 has taken the possession of the suit land in October, 1999 during absence of the plaintiff, grant a mandatory injunction against the defendant no.1 to hand over the possession of the suit property to the plaintiffs.

(B) Restrain defendant no.1 to 4 and nos.6 to 8 from transferring or

alienating the property by sale, gift, mortgage or in any other manner during pendency of the suit.

(C) Grant any other relief that may be appropriate with cost of the application."

3. The suit of the plaintiff-appellant is basically for declaration that the plaintiff no.1 is the lawfully wedded wife of deceased, Hamidmiya and that the plaintiff nos.2 and 3 are the legitimate children of Hamidmiya from the said wedlock with a further declaration about the heir in the suit property by virtue of heirship and injunction against the defendant from enjoying the property and with a further injunction not to sell the property and declare that the transactions of sale dated 12.09.1996, 01.12.1999 and 03.12.1999 are null and void.

4. The trial Court refused the injunction after coming to the conclusion that the plaintiffs have no prima-facie case nor is the balance of

convenience in their favour and it is against this order that the present appeal is preferred.

5. Learned advocate Mr.Mithani appearing for the appellant has submitted that the trial Court has not considered the plaintiffs' case on irreparable injury or balance of convenience and has not given any finding on that aspect. It is submitted that the trial Court has also committed an error in not considering the fact that the vital documents of divorce etc., are not admitted by the plaintiffs and are alleged to have been obtained under fraud. It is further submitted that the right of minor children and widow are at stake and, therefore, the protection ought to have granted.

6. Learned Advocate Mr.Shashtri appearing for respondent no.7 on caveat has opposed this appeal. According to him, the plaintiff could not establish the prima-facie case and, there was no question of examining other two requirements as all the requirements are

necessary to be satisfied for obtaining an injunction. Mr.Shashtri has also submitted that the plaintiffs right is yet to be adjudicated upon and prima-facie there is nothing to show that the plaintiffs enjoyed any title in the property even prima-facie and, therefore also, the trial Court cannot be said to have committed any error and this appeal may not be entertained. Mr.Shashtri submitted that the respondent no.7 is a bonafide purchaser of the property for value by registered sale deed, which has been executed on 1st December, 1999, which is prior to filing of the suit. It is also submitted that the plaintiff's case has not been accepted by the competent Civil Court in Regular Civil Suit No.120 of 1999 arising out of the cross objection filed by the respondents in an earlier suit filed by the plaintiffs bearing No.49 of 1996. It is submitted that the said order has not been challenged by the plaintiff-appellant before the Higher Forum and has attained the finality.

It is, therefore, submitted that the appeal may not be entertained.

7. Having considered the rival contention, it is required to be noted that the plaintiffs' case is yet to be adjudicated upon. There is no material worth a note to show prima-facie interest or title in the suit property in favour of the plaintiffs-appellants. The documents relied upon by the respondents are challenged by the plaintiffs on the ground of fraud, but there is no contemporaneous material good enough to outweigh or supersede the documents purported to have been executed by the plaintiff no.1 before a person authorised to administer oath.

8. Apart from the above aspect, what is very relevant is that the plaintiffs' possession has not been believed by the competent Civil Court vide an order in Suit No.120 of 1999 and that order has now attained finality it having not been challenged before the Higher Forum till today. First relief that is sought in the

injunction application in the present suit seeking injunction against the respondents from disturbing the possession of the plaintiff, therefore, could not have been considered and has rightly been not considered. There is more facet to this fact situation namely that the plaintiff has not approached the Court with clean hands and discretionary relief cannot be granted in favour of such person.

As has rightly been observed by the trial Court, there is no question of granting any mandatory injunction of handing over of the possession to the plaintiff in absence of any prima-facie case or prima-facie title in favour of the appellants.

9. It is also worth to note that the transactions under challenge are by a registered documents executed prior to filing of suit and as such there was no question of granting any injunction against the defendant nos.1 to 4 as they had already transacted the properties except Survey No.45/3. Be that as it may fact

remains that prima-facie the plaintiffs could not establish prima-facie title in their favour and consequently prima-facie case. There is no reason to doubt the documents purported to have been executed by plaintiff no.1 before the authority duly authorised to administer an oath, in absence of any other contemporaneous material to rule out, even prima-facie, the possibility of non-execution. That question does not survive even as per the plaint. It is submitted that the plaintiff did sign those documents, but it was under fraud. That aspect of fraud is also not established. In view of the above, there does not appear any error on the part of the trial Court in non-granting the injunction. May be the trial Court has committed some factual errors while considering the prayers in the suit but the rest of the reasonings are strong enough to uphold the ultimate finding of the trial Court and, therefore, this appeal must fail and stands dismissed.

10. It hardly needs to be noted that the observations made hereinabove are purely for the purpose of examining this Appeal From Order and the trial Court will not be bound by any observation made hereinabove while deciding the suit.

(A.L.DAVE, J.)

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